No.....

United States
Circuit Court of Appeals
For the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,
Plaintiff in Error,

vs.

EVELYN E. MASON,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

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Statement

The writ of error in this cause is prosecuted from a judgment against the plaintiff in error, defendant below, in favor of the defendant in error. The suit was brought by the defendant in error on a life insurance policy for $5,000.00 on the life of George Mason, late husband of defendant in error. The policy was made payable to "Evelyn E., wife of the insured * * * Beneficiary, (with the right on the part of the insured to change the Beneficiary in the manner provided in Section 6)". (Tr. p. 5.) A copy of the policy is

attached to the complaint. (Tr. pp. 5-31.) In Section 6 of the policy, we find the following:

> "Change of Beneficiary.—The Insured may at any time, and from time to time, change the beneficiary, provided this policy is not then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such indorsement or not. In the event the death of any beneficiary before the Insured the interest of such beneficiary shall vest in the Insured." (Tr. p. 15.)

The defendant below pleaded, as its defense, that the deceased had committed suicide. (Tr. pp. 56-57.) (Here we may note that by some mistake the original answer of the defendant, which was quite lengthy and pleaded other matters, is incorporated in the transcript. That matter is useless because the original answer was superseded by the amended and substituted answer appearing on pages 56 and 57 of the transcript. The last is, therefore, the only one that need be referred to.)

Issue was joined upon that defense. The policy contains suicide clause reading as follows:

> "Self-destruction.—In the event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more. Except as provided by endorsement hereon." (Tr. pp. 18-19, 57.)

It appears from the undisputed evidence in the case that the deceased died of two pistol wounds caused by two shots from a pistol which the deceased held in his hand. The defendant below contended that the wounds had been inflicted voluntarily. The contention of the plaintiff below was that the wounds were accidental.

The shooting occurred rather early in the afternoon in the basement of a house in Great Falls wherein the deceased lived with his wife and their one child. The wife and child were out of the house at the time, having gone down town. There was in the basement a bedstead on which was a set of springs. The plaintiff below testified that upon returning to the house she heard the voice of her husband calling from the basement below, that she went down and found him lying on the springs on the bedstead; that there was propped up near the head of the bed money in an envelope, to-wit, in bills amounting to $745.00. Over

the objection of the company defendant, the wife was allowed to detail what took place between herself and her husband at that time and later including conversations between them. The details of her testimony will be referred to more at length hereinafter. According to her testimony, the deceased arose from the bed and with her assistance walked upstairs into their bedroom and laid down on the bed. (Tr. pp. 113-126) A doctor was sent for and he and two friends appeared at the house. The deceased was moved to the hospital where an operation was performed upon him and where he died the same night. According to the doctor's description of the wounds, one bullet entered one inch to the left of the median line of the body, went through the front anterior portion of the diaphragm, through the left border of the liver, through the stomach, through the upper and outer part of the left kidney, passing out three inches from the spine. The outer bullet entered two and one-half inches to the left of the median line, through the sixth intercostal space, touching the lower part of the pericardial sac, through the diaphragm, through the spleen, cutting it almost in two, through the diaphragm, through the lower border of the lobe of the left lung, passing out about six inches to the left side. The course of the bullets was to the left outward and slightly down. (Tr. pp. 65-66.)

The company assumed the burden of proof at the trial, and in its case in chief introduced in

evidence an envelope which had been put in evidence at an inquest held before a coroner's jury and which had been filed in the ofice of the Clerk of the State District Court as an exhibit and a part of the official report of the Coroner of the inquest, and also introduced in evidence some questions put to Mrs. Mason at that inquest and answers given them by her. These statements had to do with the identification of the envelope, the finding of the money in it, and the amount of the money, and some statements attributed by her to the deceased. The testimony before the coroner's jury had been taken down by the official stenographer of the court and county. His longhand transcript accompanied and was made a part of the coroner's report. The coroner's report, including this transcript and the exhibits, was produced at the trial in this case by the Clerk of the State District Court, who was, as stated, the official custodian thereof. Mrs. Mason was not put upon the stand at the trial of this case by the defendant company. She was put upon the stand as a witness in her own behalf. Objection was made on the ground of incompetency, to testimony by her of communications to her by the deceased, or of transactions with him. The grounds of incompetency stated were, in effect, that under the statutes of the state, she could not be a witness to transactions with or oral communications from a person who, at the time of the trial was deceased, and also that she could not be allowed

to testify to alleged communications to her from her husband.

The allowance of her testimony is one of the errors relied upon in this appeal. It would seem more convenient to deal with that *in extenso,* as well as with other errors alleged, when we come to the specifications and the argument. The specifications have to do with admission of evidence offered by the plaintiff below.

SPECIFICATION OF ERRORS

I.

The court erred in overruling the objection of the defendant to the testimony of the plaintiff regarding transactions between herself and the deceased and statements made to her by the deceased, as follows:

The plaintiff, Mrs. Mason, having been sworn as a witness in her own behalf was asked to state when he, the deceased, had got up on the day of his death. She answered the question, and, without any further question being put to her, proceeded to refer to a statement that the deceased had made to her in which mention was said to have been made to a gun. Thereupon the following question was put to her:

"Q. Now, the gun,—what did you mean by 'he would get the gun'?"

"A. I had asked him to get the gun—"

Thereupon, the following objection was inter-

posed and ruling made thereon as hereinafter stated:

"MR. SCALLON.—One moment, please. We object to oral communications between these parties, on the ground the witness is incompetent to testify to the same, first, because she was the wife of the deceased and, second, because she is a party to the suit, and, regardless of marital relations, the communications would be between a party to a suit and a deceased person, and therefore, doubly incompetent. We refer to, and your Honor of course is familiar with, the provision of the law relating to married people, and in addition to that, if your Honor please, in the Act passed in February, 1913, there occur a fourth subdivision, together with the introductory sentence, reads as follows:

" 'The following persons cannot be witnesses: Parties or Assignors of parties to an action or proceding, or persons in whose behalf an action or proceding is prosecuted against any person or corporation, as to the facts of direct transactions or oral communication between the proposed witness and the deceased, or the deceased agent, of such person or corporation, and between such proposed witness and any deceased officer of such corporation.' The statute, as your Honor will see, introduces a disqualification that had not formerly obtained under the Mon-

tana statute, by introducing that subdivision four. It happens, if your Honor please, that the statute is not correctly printed in the official edition of 1913. In supplement published by Bancroft-Whitney it is substantially complete, but not absolutely so; there is an absence of a comma and the absence of the article 'the'. I have here a certified copy of the law.

THE COURT.—Has this law been construed by the courts?

MR. SCALLON.—Not that I know of.

(After a recess,)

THE COURT.—I am of the opinion that this new enactment of 1913 has no application to a case such as that now before the Court. There are two or three words in it that render it somewhat ambiguous and somewhat confusing, but I am of the opinion that it relates to a case wherein the defendant person is deceased, or the agent of the defendant is deceased, or the agent of a corporation or the officer of a corporation is deceased, where the witness about to testify purports to testify to evidence happening with that deceased person. This is not such a case to which the law is designed to apply. The defendant, no agent or officer, is involved; simply a statement of a witness and party's deceased husband to her. Now, as to

the provision of the law that no husband nor wife, without the consent of the other, can be examined as to any communication made by one to the other during marriage, of course that law is designed for a good purpose, supposed to be better for the peace and happiness of the family and for communities in general that husband and wife be not permitted to testify as to what happened between them, either against the other, or in any other proceeding, unless both are willing. Where one is dead, of course the consent of that person cannot be procured and ordinarily the testimony of the other to what took place between them during the marriage relation, received during the married relation, would be excluded, but in this case the defendant has already introduced some testimony as to what this witness said had taken place between her and her husband in her lifetime, and I am of the opinion that, so far as the defendant will be in position to invoke that rule of law, that they have waived it and can waive it: parties can waive it; they waived it by appealing to those very confidential communications which it is the policy to bar. For instance, they have had witness Silk testify as to what this witness testified to at the coroner's inquest in reference as to what her husband had said to her, and

produced an envelope written by him to her which she had secured. Therefore, for these reasons, the objection, which I believe otherwise would be good, will be overruled.

MR. SCALLON.—Note an exception.

Q. Please read the last question.

MR. SCALLON.—To avoid entering any further objections of record, it may be understood this goes to the whole of this.

THE COURT.—I think so, yes, so far as it touches communications between the witness and deceased husband, private communication." (Tr. pp. 115-118).

Thereupon Mrs. Mason testified as follows:

"A. I had asked him to get the gun because someone had broken in the back door before and someone was around the house that night, and a few days before he promised to get it and he never got it, and that evening I was downtown, baby and I, and I went into the Gerald Cafe and I went in the back box and Mr. Frederickson waited on us and George came in and I asked him if he had seen about getting the gun, and he said, 'No, but I will tonight as soon as Mr. Burns comes in.'

* * * * * * *

Why, he seemed happy; he come back and kissed me and he had been playing with the baby and rolling on the floor with an orange."

The witness then having stated that she had gone down town and had returned home near to four o'clock, and that she heard the deceased calling from the basement:

"Q. What did he say?

"A. He said 'Mae!' (Tr. p. 119.)

* * * * * * *

"A. He said, 'I bought that gun and it shot me twice.' (Tr. p. 120.)

* * * * * * *

—I started to pick the gun up and he grabbed hold of my hand and told me not to touch it, it would shoot me, it shot repeatedly, and he didn't want me to touch it. (Tr. p. 120.)

* * * * * * *

I helped him upstairs * * *."

While in the basement, she testified further that "I asked him how it happened and he said, 'I didn't mean to' ". (Tr. pp. 120-121.)

Then the witness, having testified about the envelope, and having said that the envelope was sitting on the bed, at the head of the bed, she added:

"And he told me to take the money and stick it in my dress. I says, 'Why do you think of money now?' He says, 'If I have to stay in the hospital you will need that money.'

"Q. Did he say when he wrote that note?

"A. Why, he said he tried to get up and he couldn't, and he thought he was dying, so he didn't want to have the money in his pocket and afraid I wouldn't get it, so he took an envelope off the floor, and a trunk at the head of the bed, and he wrote it with a short pencil he had in his pocket to write orders with; the pencil was on the floor." (Tr. pp. 121-122.)

Then the witness stated that somone had tried to pry a screen partly off a window in the house, and that she had told him. Then being asked what evidence there was that that had been done, she said:

"When I told him he said it was the coal cracking in the basement; then he went out and looked and there was a piece of steel about that long (indicating) under the window, and he brought that in, and he was angry and said, 'I am going to get that gun and if someone tries to get in the house, to shoot them.' " (Tr. p. 124.)

Then she was asked:

"Q. What, if anything, had you and Mr. Mason planned to do in the spring of 1919, just prior to his death or about that time?

"A. Why, we were going to sell this home and take the money we had and a few liberty bonds and try to buy a larger place closer in, where we could have a couple of roomers and I wouldn't be afraid to stay alone.

"Q. And for that purpose did he attempt to get any money any place?

"A. That is the reason he sold this stock we had." (Tr. p. 124.)

The following questions were also put to her and answered as follows:

"Q. Mrs. Mason, what do you say that he said about the gun when you went downstairs? I am not sure whether the jury heard that or not.

"A. He told me, 'I bought that gun and it shot me twice,' and he told me not to touch it that it shot repeatedly, that it might shoot me.

"Q. What else, if anything, did he say about it?

"A. He told me he didn't mean to shoot hisself— 'Why would an accident happen like this?'

"Q. Did he say anything about whether or not he was shot seriously?

"A. No, he told me he didn't think he was, when we were in the basement.

"Q. You may state whether or not he said anything to you about—

"A. He told me not to worry, everything would be all right." (Tr. p. 126.)

All of these questions and answers were given in chief.

II.

The Court erred in overruling defendant's ob-

jection to the question put by plaintiff's counsel to plaintiff's witness Frederickson, to-wit:

> "Q. Did he [referring to deceased] about the time Mr. Scallon was asking about him say anything about buying some more property in town?"

which was objected to as immaterial and irrelevant and also as self-serving, to which witness answered, after an explanatory question or two:

> "He said he was going to sell his stocks he had and was going to buy city property with his money from now on." (Tr. pp. 100-101).

III.

The Court erred in overruling the objection to the following question put to the witness Frederickson, to-wit:

> "Did you her anyone ask him [referring to deceased] to purchase a gun?"

which was objected to as immaterial, irrelevant and incompetent, and to which the witness answered:

> "A. Well, I heard Mrs. Mason say one time, 'George, you will have to get me a gun if you want me to stay out at that house'. "

The witness further stated that the deceased stated to the witness that "he would have to get a gun * * * because his wife did not like to stay in the house alone unless she had a gun." (Tr. pp. 101-102).

IV.

The Court erred in overruling the objection of the defendant to the following question put to the witness David, testifying on behalf of the defendant:

> "You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him [referring to deceased]"

which was objected to as incompetent.

A. "I should say so; yes." (Tr. p. 111.)

ARGUMENT

I.

Errors in Admitting Testimony of Plaintiff Regarding Statements of Deceased.

There was, at the time of the trial, the following statutory provisions in Montana regarding witnesses:

> Section 7891 (as amended by Chapter 41 of laws of 1913):
>
> "The following persons cannot be witnesses.
>
> 1. Those who are of unsound mind at the time of their production for examination.
>
> 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.
>
> 3. Parties or assignors of parties to an ac-

tion or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, as to the facts of direct transactions or oral communications between the proposed witness and the deceased, excepting when the executor or administrator first introduces evidence thereof, or when it appears to the court that without the testimony of the witness, injustice will be done.

4. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transactions or oral communication between the proposed witness and the deceased, or the deceased agent, of such person or corporation, and between such proposed witness and any deceased officer of such corporation."

Section 7892:

"Persons in certain relations to parties prohibited.—There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband without his

consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

* * * * * * *"

Subdivision 4 of Section 7891 was added to it in 1913. It so happens that in the printed laws of 1913, some words were omitted from this subdivision 4. The section as quoted is copied from a copy of the act certified by the Secretary of State and which will be submitted with this brief. The court, in passing upon the objections, stated, in effect, that the enactment of 1913 had no application to a case such as that at bar; but as to the communications between husband and wife, the court said that the objections would have been good if the defendant company had not itself waived it by introducing in evidence the statements of Mrs. Mason before the coroner's jury and testified to by the witness Silk.

Inasmuch as the court conceded that the objection resulting from marital relations would have been good except for the waiver, we shall take up that matter first.

We submit that there was not any waiver on the part of the defendant; that the defendant had the absolute right to put in evidence the declarations

of the plaintiff in the case, and that in so far as the envelope referred to was concerned the defendant had a positive right to introduce it in evidence, and, therefore, the defendant waived nothing by putting these matters in evidence.

The envelope, as we have stated, was a public record in the office of the Clerk of the District Court. The transcript of the testimony given at the coroner's inquest was a public document there on file. The statute of Montana provides:

Section 9668:

> "*Testimony in writing, and where filed.*— The testimony of the witness examined before the coroner's jury must be reduced to writing by the coroner, or under his direction, and forthwith filed by him, with the inquisition, in the office of the Clerk of the District court of the County."

The defendant company had nothing to do with the coroner's inquest. It never put Mrs. Mason on the stand, never examined her as a witness. Whether or not it was proper for Mrs. Mason to testify before the coroner's jury to alleged statements of her husband is a matter with which the defendant was not concerned. The envelope itself seems to have been there produced by the person conducting the examination of the witness. How it came into his possession does not appear. For aught that does appear, the envelope may have been obtained originally by the coroner or the county attorney in the course of offi-

cial duty. The witness Silk, who was the official reporter, states that he is not sure who produced the envelope at the hearing; that "it may have been introduced by Mr. Ewald, Deputy County Attorney, who was present that night at the hearing". (Tr. p. 93.) Regarding this envelope the following questions were put to the plaintiff at the coroner's inquest:

"Q. Where was the money?

"A. It was in an envelope sitting on the bed—on the spring.

"Q. Was this the envelope the money was in?

"A. Yes, that is the one." (Tr. pp. 93-94.)

The only other parts of the testimony of Mrs. Mason before the coroner's jury which were put in evidence in this case by the defendant are the following:

"Q. Was it all sealed up?

"A. No, the end was off; it was not sealed.

"Q. This envelope, you say, was on the bed?

"A. It was sitting propped up.

* * * * * * *

He said he had some money in his pocket and he took a pencil and wrote on an envelope on the floor and he says, 'You have another dividend in the Anaconda coming.' "

* * * * * * *

"Q. It was in bills, was it?

"A. Yes.

"Q. $25, he said?

"A. No, $745 in there and a $25 dividend I think. The Anaconda has not paid the last dividend. I think that is the way." (Tr. pp. 94-95.)

It will be noted that all of these extracts from that testimony had to do with the matter of the envelope. From this it would seem that the envelope was exhibited by the person conducting the examination of the witness. If nothing had been written on the envelope, it is clear that no question could arise as to the right to put it in evidence. As stated, however, there were on the envelope written the words "May, there is still a dividend coming from Anaconda".

The question of the admissibility of a written communication from one spouse to the other, which had become a public document, was considered in the case of

Lloyd v. Pennie et al., 50 Fed. 4,

in a decision by the Honorable Mr. Justice Morrow, wherein the cases on the question were reviewed, and wherein it was held, in effect, that there was a positive right on the part of a litigant to put such a document in evidence, and that it was not privileged. The opinion refers to the following cases which support the views therein stated:

State v. Buffington, 20 Kansas 599, 27 Am. Rep. 193;

State v. Hoyt, 47 Conn. 518.

See also

Johnson v. Heald, 33 Md. 352.

If this document was not privileged and if the defendant had the positive right to introduce it in evidence, its right to object to incompetent testimony on the part of the widow cannot be affected or prejudiced. There cannot be any waiver in such a case resulting from the doing of an action which a party has a right to do and which the statute does not interfere with.

Regarding the statements made by Mrs. Mason at the coroner's inquest, the simple fact is that they were declarations made by a party to this suit. It is an invariable rule that declarations by a party to a suit may be proved against him. It is true that these declarations of herself included statements alleged by her or stated by her to have been made to her by the deceased. Those statements by her might or might not have been true. The deceased might or might not have made these statements to her, but she incorporated them in her testimony before the coroner. They become a part of her statements. They were provable against her, because they were part of her statements. It so happens they were made before a coroner's jury. Suppose they had been made to someone else, say, for example, to an agent of the defendant company in a conversation or discussion regarding the death. It seems clear that the whole of the statements made by the plaintiff could be introduced in evidence against her, even

though they purported to include statements by the deceased. Indeed, we may ask, upon what ground could a witness testifying to such statements be required to leave out such portions as purported to be repetitions of statements by deceased, and testify only to the remainder? Or,suppose Mrs. Mason had written a letter to the company or to some other third person, embodying these alleged statements of the deceased, would not such a letter or writing be admissible as a matter of right as against her? No distinction can be drawn between such unofficial statements and those made by her at the coroner's inquest. There is no special circumstance in the case which would, in any manner, have justified their exclusion. There does not seem to have been any compulsion exercised upon her. It is not claimed that her testimony was not purely voluntary, and as we have seen—in so far as the envelope is concerned—it seems to have been at the time of her examination in the possession of the person conducting the examination. There was no advantage taken of her in any manner. So, whether or not special circumstances might, in a possible case, affect the rule, need not be considered, because of their absence in this instance.

We further submit that, properly speaking, there cannot be any question of waiver in this matter, in so far as the defendant is concerned, in connection with the objection to this testimony of the plaintiff in this case. The law declares these

communications between husband and wife inadmissible in evidence on grounds of public policy. Only the spouses themselves can waive. A third party cannot waive. He has nothing to say in the matter.

(Of course, if no objection is made, error may not be alleged but that is a different matter.)

It is respectfully submitted that the doctrine of waiver is not applicable at all. It is estoppel that would have to be invoked. But evidently, there was no ground on which to hold defendant estopped from objecting. How then can any question of waiver or of estoppel be raised in this case?

Here the defendant had a right to introduce on its part the envelope and the statements of the plaintiff herself. Having simply exercised a right, it seems evident that it still has the right to object to incompetent evidence. It is further submitted that, even if there had been a question as to the admissibility of the statements of the plaintiff, the offer of them would work no estoppel. The court let them in. The court makes the rule, not the litigant.

Different considerations would arise if the plaintiff had offered in evidence other but relevant portions (if any) of her testimony at the coroner's inquest. Then another and quite different rule would have come into play, viz., the rule that where a part of a statement or writing has been put in evidence, any other relevant part

may also be put in evidence, but no such offer was or is here involved.

Again, it will be noted that the testimony here objected to was not offered in explanation or denial of plaintiff's previous statements. It was offered as independent, direct and original evidence. It must, therefore, be admissible as a matter of absolute right or it is not admissible at all.

A similar point was presented in

Brown v. Burgett, 61 Hun. 623, 15 N. Y. S. 942,

(a decision in the Appellate Division), affirmed by the Court of Appeals of New York, on the opinion of the court below, in

149 N. Y. 578, 43 N. E. 986.

The evidence of the plaintiff in that case to a transaction had with the deceased had been excluded at the trial on the ground that under the statute of New York, the plaintiff could not be allowed to testify regarding that transaction. It was contended by the plaintiff, however, that the defendant had waived the objection, because the defendant had testified to statements made to him by the plaintiff. There, as here, the statements of the plaintiff so testified to embodied a statement of his own transaction with the deceased. In all essential particulars, a situation exactly similar to that at bar was presented. The plaintiff in that case argued on the appeal to the Appellate Division that:

"The defendant had testified concerning

the same transaction, and so had opened the door to the testimony of the plaintiff in respect thereto."

The court disposed of the argument by saying:

"The argument is already answered by showing that the defendant had not testified to the transaction itself, but only to the plaintiff's admissions as to what the transaction was."

The statute of New York considered in that case was as follows:

Section 829, Code of Civil Procedure:

"Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee or person so deriving ti-

tle or interest is examined in his behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof."

(Vol. 12 Encyclopaedia of Evidence, page 712.)

The Statute of 1913

Thus far we have treated the subject from the standpoint of communications between husband and wife. We now come to the other statutory disqualifications. We note that the alleged "waiver" spoken of by the court below, had no relation to the right to invoke the provision. Subdivision 4 of the Act of 1913 amending Section 7891, quoted above, seems clearly intended to prevent a party testifying to transactions with a deceased person. The terms are very broad. It does not, like subdivision 3 of the same section, apply merely to the case where the adverse party is a representative of the deceased, but to any case of a transaction with a deceased person.

The transactions here testified to by the plaintiff were, of course, put in to sustain her claim against the defendant. If competent, they were material to the controversy. The theory of the statute

clearly seems to be that a party to a suit shall not be allowed the undue advantage of relating transactions with a dead person. The words "transactions between the proposed witness and the deceased person" cannot be limited in such manner as to restrict their application to predecessors in interest of parties in suits. The words "parties or assignors of parties to a suit against *any person or corporation*" also show that the words "the deceased person" are intended to apply to any deceased person. The definite article "the" is used where possibly the indefinite article "a" would have been more appropriate, but the meaning is the same. It cannot be any different. The reference is to transactions between the proposed witness and a deceased person. It is not possible to limit the application of paragraph 4 of a case where the opposite party is a successor in interest of a deceased. That could not be done without adding words to the statute, the addition of which would be equivalent to legislation. Moreover, such a construction would be inconsistent with the express provisions relating to transactions with a deceased *agent* of a person or corporation. Here the person or corporation was the principal and not a representative or successor, and the deceased merely the agent and not a predecessor.

It has been so held in Minnesota in the case of

Pitzl v. Winter, 96 Minn. 499, 105 N. W. 673, 5 L. R. A. (New Series) 1009,

under a statute reading as follows:

> "It shall not be competent for any party to an action, or any person interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue between the parties, unless the testimony of such deceased or insane person concerning such conversation or admission, given before his death or insanity, has been preserved, and can be produced in evidence by the opposite party, and then only in respect to the conversation or admission to which such testimony relates."

This is copied from Encyclopaedia of Evidence, Vol, 12, page 710. It will be noticed that the number of the section in the Revised Laws of Minnesota of 1905 differs from that given in the opinion in which reference is made to the statute of 1894 wherein the section was designated as 5660, but the wording is identical, as may be seen upon reference to the case of Bower v. Schuler, 55 N. W. 817. It is stated in that decision that the exclusion is the result of a "growth", or gradual additions.

The Minnesota statute just quoted and the statutes to be referred to below show that Montana does not stand alone in the matter of these regulations, for these other statutes are as broad and one of them even broader than ours. In Nevada they have a statute reading as follows:

"All persons, without exception, otherwise than as specified in this chapter, who have organs of sense, can perceive and perceiving can make known their perceptions to others, may be witnesses in any action or proceeding of any court of this state. Facts which, by the common law, would cause the exclusion of witnesses may still be shown for the purpose of affecting their credibility. No person shall be allowed to testify:

1. When the other party to the transaction is dead * * *".

Another paragraph provides for disqualifications in suits against an estate, etc. (Rev. Statutes of 1912, sec. 5419). In

Forsyth v. Heward, 41 Nev. 305; 170 Pac. 21,

where the plaintiff sued the executor of an estate and others, alleging that he, the plaintiff, had been adopted by the deceased and her husband, two witnesses, namely, the father and mother of the plaintiff, were held incompetent under that statute to testify to either statements or acts of the deceased.

There, the witnesses excluded were not even parties to the suit. It may be worth noting that a provision similar in effect, though different in words, had been in force in Nevada at an early period, and was pased upon by the Supreme Court of that state in

Roney v. Buckland, 4 Nev. 45, 58;

that it was afterwards changed, either unwittingly or by design, so that the rule for a time was held to have been modified, as may be seen in the report of the case of Crane, Hastings & Co., v. Gloster, 13 Nev. 279, but the provision was afterwards restored in even a more clear and definite manner. It may also be noted that the old provision was spoken of very favorably by Chief Justice Beattie in Crane, Hastings & Co. v. Gloster, just mentioned.

So, in Kentucky, there is a statute, the pertinent provisions of which are as follows:

> "Subject to the provisions of subsection 7 of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given except for the purpose, and to the extent, of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted, unless—a. The infant or his guardian shall have testified against such person, with reference to such statement, transaction or act; or, b. The person of unsound mind shall, when of sound mind, have testified against such person, with reference thereto;

or, c. The decedent, or a representative of, or some one interested in, his estate, shall have testified against such person, with reference thereto; or, d. An agent of the decedent or person of unsound mind, with reference to such act or transaction, shall have testified against such person, with reference thereto, or be living when such person offers to testify, with reference thereto."

That statute has been applied in a case where a judgment debtor claimed to have paid to a sheriff, who was holding an execution, and to a deputy of a sheriff, the amount of the judgment, both sheriff and deputy being dead. The judgment debtor, who was defending against the judgment creditor who had purchased real property at a sheriff's sale, was held incompetent to prove payment.

Gaar, Scott & Co. v. Reesor, (Ky.) 91 S. W. 717.

Other illustrations of applications, similar in essential particulars for which we are contending, will be found in

Trail v. Turner, (Ky.) 56 S. W. 645;
Girdner v. Girdner, (Ky.) 32 S. W. 266;
Helton v. Asher, (Ky.) 46 S. W. 22.

It is submitted that the evidence was incompetent.

II.

Errors in the Admission of Testimony by the witness Frederickson.

Specifications No. II and III.

This witness was put upon the stand by the plaintiff and testified to the relations between the plaintiff and the deceased. He was a friend of theirs. He testified in chief regarding the disposition of the deceased and his relations with his family, seemingly, for the purpose of showing absence of motive to commit suicide. On cross-examination, he was asked regarding a trip made by deceased to California and about the condition of the health of the deceased. On re-examination, he was asked:

> "Did he about the time Mr. Scallon was asking about him say anything about buying some property in town?"

This was objected to as immaterial and irrelevant, and also as self-serving. The objection having been overruled, the witness testified:

> "He said he was going to sell his stocks he had and was going to buy city property with his money from now on;"

and that deceased had made that statement after his return from California just a few days prior to his death. Immediately following that, he further stated, in answer to another question:

> "He said he might sell the old home and build a home closer in on account of his wife

didn't want to stay out there alone, it was too far out."

In overruling the objection, which was on the ground that the evidence was immaterial, irrelevant, and also self-serving, the court said:

> "No, I think not under the circumstances; he has asked for circumstances covering the same period. I think he may state any others that he knows that might bear an inference of expectation of continued life, if it bears such. For the jury; the objection will be overruled." (Tr. pp. 100-101.)

It is submitted that these alleged statements of deceased were inadmissible. If they were to be held admissible, any self-serving declaration could be put in evidence.

Again, the witness was asked whether he had heard anyone ask the deceased to purchase a gun. The court overruled the objection stating:

> "As the Court has said before, it may furnish a circumstance. If there is any room for inference that he bought the gun for suicidal purposes I think it would be permitted to show that he bought it for other purposes."

The witness thereupon testified that he had heard Mrs. Mason at one time say to him, " George, you will have to get me a gun if you want me to stay out at that house." (Tr. pp. 101, 102). And that the deceased had said to the witness that he would have to have a gun because his wife did not like to

stay in the house alone, unless she had a gun. (Tr. p. 102.)

These are also self-serving.

Self-serving declarations are not admissible.

Rulofson vs. Billings, 140 Cal. 452, 74 Pac. 35;

Spellman vs. Rhode, 33 Mont. 21, 26.

III.

Specification IV.

The witness David was allowed over objection to answer the following question:

> "You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him?"

to which he answered:

> "A. I should say so, yes." (Tr. p. 111.)

It is submitted that opinion evidence was not competent as to such a matter. The witness could have detailed what deceased did, but not give his opinion. That is not within the provisions allowing opinion evidence.

Code of Civil Procedure of Montana, Sec. 7887.

This section, subdivisions 9 and 10, specifies the cases where opinion evidence may be given, viz:

> "9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwrit-

ing; his opinion of a question or science, art or trade, when he is skilled therein.

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of intimate acquaintanceship respecting the mental sanity of a person, the reason for the opinion being given."

It is respectfully submitted that the judgment herein should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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